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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 258

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SUPREME COURT, U.S.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

**APPELLANTS' BRIEF IN OPPOSITION TO THE
MOTION TO AFFIRM FILED BY THE INTER-
VENOR, TEXAS CITRUS & VEGETABLE
GROWERS AND SHIPPERS.**

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STATEMENT.

The intervenor, Texas Citrus & Vegetable Growers and Shippers (hereinafter termed "Texas"), here asserts by its motion to affirm that "the question on which the decision of this cause depends is so unsubstantial as not to need further argument." Neither the United States of America nor the Interstate Commerce Commission have filed motions to affirm the order of the United States District Court for the Eastern District of Missouri, Eastern Division.

This cause had its origin in a proceeding instituted before the Interstate Commerce Commission by the intervenor, Texas, and designated as Docket 30074. Assailed

before the Commission were the rates and charges on vegetables from the State of Texas to various destinations in the United States. The Commission by its order of December 21, 1950 prescribed maximum reasonable rates on certain vegetables for application in the future. Appellants thereafter timely filed a petition with the Commission for reconsideration and rehearing which included detailed statements showing that the rates prescribed, if made effective, would cause confiscation of appellants' property in violation of the Fifth Amendment to the Constitution of the United States. The record before the Commission, in accordance with usual practice, did not contain cost evidence necessary to a determination of the confiscation question. Appellants sought the opportunity on rehearing to offer such evidence in support of their claim of confiscation. The Commission did grant reconsideration on the record as made but denied the petition for rehearing. On January 7, 1952, the Commission issued its further report and order modifying its former findings "principally as to form." On February 15, 1952, appellants again requested the Commission by petition to grant a rehearing to afford appellants the opportunity to prove their claim of confiscation. This petition also was denied by the Commission on March 7, 1952. Thereupon, appellants filed their action in the District Court claiming that confiscation would result from the order of the Commission and sought its annulment.

Appellants conformed to the correct practice approved in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, and, by their complaint, requested a judicial determination of the issue of confiscation. Appellants also stated their intention to offer evidence necessary for that determination which evidence the Commission had refused to hear by its denial of appellants' petitions. Also, in ac-

cordance with the practice stated to be proper in *New York v. United States*, 331 U.S. 284, 336, appellants subsequently filed a motion to stay the proceeding before the District Court and to remand to the Commission for the purpose of obtaining that agency's preliminary appraisal of evidence showing the costs of performing the service for which the rates were prescribed. Appellees contemporaneously filed motions to dismiss upon the grounds that the complaint failed to state a claim upon which relief would be granted. The District Court held that appellants had no right to a hearing where evidence of confiscation could be introduced after the issuance of the confiscatory order even though the issue of confiscation was raised seasonably before the Commission. Appellants' motion to stay and remand was denied. Appellants did not allege in their complaint that the evidence of record before the Commission showed the rates prescribed to be confiscatory but rather that evidence showing such confiscation would be produced for the District Court's judicial determination. The District Court denied appellants the right to introduce such evidence by its order to dismiss. The action of the District Court on both motions was predicated on its stated belief that appellants had no right to a hearing for the introduction of evidence at any time after the confiscatory order of the Commission was entered even though appellants had followed correct practice and raised the confiscation issue seasonably before the Commission.

The Question Presented.

The question presented on this appeal was stated by the court below in the following words:

The question for the court is whether or not the plaintiffs have a right to a trial *de novo* at this stage

of the proceedings on the question of confiscatory rates. One of the important elements in the determination of just and reasonable rates is cost of service, but the question here is: When must such evidence be presented?

Both the Commission and the District Court have denied appellants the right to present evidence in support of their contention that the prescribed rates were confiscatory. Appellants state that this denial is not only in conflict with controlling decisions of this Court but also that this denial effects a deprivation of appellants' constitutional rights.

ARGUMENT.

I.

Appellants' Right to a Judicial Determination of Their Claim of Confiscation.

Much of what is said in support of Texas' motion to affirm does not deal with the substantial question here presented. The position of Texas is apparently that, upon the basis of various rate comparisons, appellants could not prove their claim of confiscation in violation of their constitutional rights as a result of the order of the Interstate Commerce Commission in Docket 30074 even if appellants were permitted the opportunity to present evidence in support of their claim. Texas overlooks that the complaint alleges that the rates prescribed by the order of the Commission will yield revenue less than the costs of providing the service covered by said rates, an allegation which must be admitted for the purpose of the motions to dismiss. *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 126. Further, the ability of appellants to prove their allegations is not the question presented by this appeal. As the District Court pointed out in its opinion, the question for the Court is whether or not appellants have a right to present evidence in the District Court in support of their claim of confiscation.

The Supreme Court has long held that the determination of the fact of confiscation is one for the courts. Typical of many of the decisions of the Supreme Court which have so held is *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 where the following is stated:

But the Constitution fixes limits to the rate-making power prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

See also *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 364; and *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289. The effect of the order of the District Court is to deny appellants the right to a judicial review of their claim of confiscation. The District Court so held despite the fact that appellants did attempt in two petitions for rehearing before the Commission and in their complaint in the District Court to secure the opportunity to present evidence which would show the fact

of confiscation. Should the opinion of the District Court stand, it would work a reversal of long standing precedent that a litigant is entitled to a judicial determination of its claim of confiscation.

II.

Appellants' Conformance To "Correct Practice" In Raising Their Claim Of Confiscation.

The basis of the District Court's order was that appellants in a rate case must present their cost evidence in the initial hearings before the Commission prior to the issuance of a confiscatory order or else be forever foreclosed of their constitutional rights. This position was taken despite the fact that appellants in every way conformed to what had been described by the Supreme Court as being "practice appropriate and desirable" to raise this issue of confiscation. See *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 371-372, and *New York v. United States*, 331 U.S. 284.

In both *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, and the instant case, a hearing was held before an examiner, a proposed report was issued, a final report was issued by the Commission, and thereafter, a petition was filed seeking reconsideration and rehearing upon the ground that the order of the Commission, if made effective, would cause confiscation of the appellants' property in violation of their constitutional rights. The Commission denied these petitions for rehearing. The District Court in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, permitted the introduction of new cost evidence to show the fact of confiscation. The Supreme Court held that this was correct practice which was "appropriate and desirable as indicated in *Manufacturers' R. Co. v. United States*, 246 U.S. 457". Since appellants followed

this same approved practice, step by step, the District Court should have made a similar finding here.

The basis of the Supreme Court's finding, and what should have been the basis to the finding of the District Court is stated thus (298 U.S. 349, 370, 371-372):

They could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the commission's findings and report, to set up a fear of transgression of their constitutional rights. Presumably the commission would keep within the law.

. . . .

The appellants were not given and could not obtain a hearing before the commission upon the question of confiscation. Their failure earlier to invoke constitutional protection does not bar this suit. That they diligently sought relief from the commission is shown in the latter's brief here in which, justifying or explaining its denial of the second petition for rehearing, it says: "When the Commission denied the second petition, it already had before it and had considered the proffered evidence in support of the claim of confiscation that appellants desired it to consider, as well as the entire record of the previous hearings, much of the testimony in which consisted of cost calculations and other statistical data offered by the appellants." Appellants conformed to practice appropriate and desirable as indicated in *Manufacturers R. Co. v. United States*, 246 U.S. 457; 489, 62 L. ed. 831, 847, 38 S.Ct. 383, and recently expounded in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, ante, 1033; 56 S. Ct. 720.

Note the specific reference to *Manufacturers' R. Co. v. United States*, 246 U.S. 457, which is erroneously relied upon by the District Court in its opinion. Appellants here properly raised the confiscation issue in their petition for rehearing before the Commission in precisely the same

manner as was approved in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349. The District Court should have permitted a hearing for the introduction of cost evidence by appellants in support of their claim of confiscation.

The District Court attempted to distinguish *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, on the ground that it involved divisions and for that reason was "not in point in this proceeding." But the statutory language defining the powers of the Commission in the establishment of both rates and divisions is virtually the same. See 49 U.S.C. §15(1) and §15(6); 41 Stat. 484-5, 48 Stat. 1102, 49 Stat. 543, 54 Stat. 911, and 41 Stat. 486. And this is confirmed by *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 357, where both rates and divisions for the purposes of confiscation are treated alike, the Court stating:

But this does not imply that, without regard to amount, the carriers are bound to accept prescribed divisions. *Congress is without power, directly or through the commission, to require them to serve the public at rates that are confiscatory. When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent of Acts of Congress requiring the carriers to serve for the amounts specified.* Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose appropriate the use of carriers' property (Emphasis supplied).

The distinction made by the District Court is not sound. Appellants did conform to correct practice in raising the issue of confiscation in their petitions for rehearing in which the opportunity to show the fact of confiscation was sought. Texas asserts in its motion that these petitions were not in accord with the General Rules of Practice

before the Interstate Commerce Commission. This contention was never made before the Commission and is not true.

New York v. United States, 331 U.S. 284, another case relied upon by the District Court, refers expressly to *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, without suggesting that there is any difference between a case involving rates and one involving divisions. In *New York v. United States*, 331 U.S. 284, this Court, just as it did also in *St. Joseph Stockyard Company v. United States*, 298 U.S. 38, treated *Manufacturers R. Co. v. United States*, 246 U.S. 457, as establishing the principle that a litigant in a rate case is entitled to an opportunity to present evidence on the issue of confiscation after the confiscatory order is entered. In fact, *New York v. United States*, 331 U.S. 284, establishes firmly that under present practice, the District Court should have remanded the cause to the Commission for the purpose of determining the administrative issue of costs in accordance with appellants' motion to remand. In that proceeding, new cost evidence was also tendered and received by the District Court on the issue of confiscation. The Supreme Court in reviewing this practice stated "that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question" (p. 334). This is precisely what these appellants sought by their motion to stay and remand which was denied by the court below.

Alabama Public Service Commission v. Southern Railway Company, 341 U.S. 348, another case relied upon by the District Court is expressly grounded on *New York v. United States*, 331 U.S. 284. The only other case cited in

the opinion of the District Court is *United States v. Capital Transit Company*, 338 U.S. 286, which is not in point since in that case the issue of confiscation had not been properly raised before the Commission.

In the usual rate proceedings, before the Interstate Commerce Commission, evidence with respect to costs is not usually necessary and it is not the general practice to introduce such evidence. The Court knows from its observations in *New York v. United States*, 331 U.S. 284, 328, that the preparation, presentation and evaluation of such evidence is a task of real complexity. Should the order of the District Court stand and existing precedent be overruled, it will be necessary for litigants such as these appellants to introduce cost evidence in every rate proceeding before the Commission in order to safeguard their constitutional rights. If they do not do so, they will be forever foreclosed from asserting these rights. Such a general practice would greatly increase the burden of litigants, the public and the Commission.

Should the order of the District Court stand, it will work a reversal of long standing precedent of this Court that litigants such as these appellants can properly raise a claim of confiscation in court and submit evidence of confiscation which may not have been presented to the administrative body. Such would be the case even though litigants had in a timely and proper manner attempted to present evidence in support of their claim of confiscation to the administrative body immediately after the issuance of the confiscatory order. When such consequences might result there should be a full review by this Court of the District Court's order.

CONCLUSION.

Appellants submit that for the reasons there stated, the motion of Texas to affirm the order of the District Court should be denied.

Respectfully submitted,

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